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Philip N. Hogen, Chairman
Vice-Chairman Choney
National Indian Gaming Commission
1441 L Street, NW, Suite 9100
Washington, DC 20005

VIA FACSIMILE: 202.632.7066

Re: Comments on Class II Classification Standards and Electromechanical Facsimile Definitions

Dear Chairman Hogen and Vice Chairman Choney:

On behalf of the Confederated Salish and Kootenai Tribes, I am writing to submit comment to the National Indian Gaming Commission ("NIGC") proposed rules for Class II Classification Standards and Definitions. Our Tribes remain concerned with the manner in which the NIGC has developed these regulations, as well as the substance of the regulations.

The Chairman of the NIGC has publicly acknowledged that the proposed rules will impact over thirty-five thousand (35,000) existing Class II games currently in play throughout Indian Country. In the advancement of these proposed regulations, the NIGC has failed to adhere to: Presidential Executive Orders, NIGC policy, and a variety of federal statutory requirements. Although the NIGC has conceded that the proposed regulations will effectively terminate the tribal government use of over 35,000 existing technological aids--the NIGC has failed to produce any economic assessment of their proposal in accordance with the Regulatory Flexibility Act, Small Business Regulatory Enforcement Fairness Act, and Unfunded Mandates Reform Act. Due to the significant takings at risk, the NIGC has failed to provide a takings assessment in accordance with Executive Order 12630. The NIGC has further failed to determinate whether the proposal unduly burdens the judicial system in accordance with Executive Order 12988. The NIGC has failed to adhere to any meaningful government-to-government

consultation in accordance with Executive Order 13175 and in accordance with its' own tribal government-to-government policy.

The only effort that the NIGC has advanced to comply with Executive Order 13175 and its' tribal government-to-government policy, with these proposed regulations is to attend 4 meetings. Although the NIGC labels attendance at national conferences as "consultation" we are not aware of any tribal government that has deemed your appearance at conferences as government-to-government consultation. The proposed regulations also reference the NIGC's "Tribal Advisory Committee" (TAC). Due to the NIGC's failure to comply with the Federal Advisory Committee Act (FACA), we are unfortunately unable to determine which advice, if any, from the TAC was supported or omitted by the NIGC.

The current rulemaking process unnecessarily lacked meaningful consultation with Indian Tribes. Although the NIGC has hosted 4 meetings, the NIGC failed to comply with its own consultation policy, which requires that the NIGC engage in meaningful government-to-government consultation with Tribes. The 4 meetings hosted by the NIGC were quite cumbersome for Tribes in our area to travel and participate—as the nearest location was well over 500 miles from our Tribes. The Montana Tribal Gaming Association (MTGA), which is comprised of the Assiniboine and Gros Ventre Tribes of Fort Belknap, the Crow Nation, the Northern Cheyenne Nation, the Blackfeet Nation, the Chippewa-Cree Nation and the Confederated Salish and Kootenai Tribes formally invited the NIGC to Indian Country to discuss these pending regulations, and although the Denver meeting was cancelled—the NIGC failed to accept our invitation or otherwise accommodate the MTGA request. Due to the lack of "public" meetings at the 4 locations, the NIGC has not published any formal meeting minutes or record of its transactions. As a result, our Tribes are advising that the NIGC hold public hearings on the regulations with recorded comments and include all prior and current submissions as part of the administrative record.

In order to avoid costly and unnecessary litigation we urge the NIGC to refrain from placing arbitrary restraints on class II gaming. Although we have no strong objection to removing the term "house banked" from the definition of a "game similar to bingo," we oppose the proposed definition of "electromechanical facsimile." We disagree with the NIGC's claim that bingo, lotto, and other games similar to bingo, are facsimiles when played in an electronic medium. The current definition is clear on its face, so long as the electronic format broadens participation among players and is not played against the machine, such games are *not* facsimiles. As such, it is recommended that the NIGC delete the proposed re-definition. (See Proposed Rule at §502.8).

The classification standards are arbitrary and contrary to established case law, and as such we recommend that the NIGC delete the proposed restrictions on the game display, ball draw, daubing, prize amounts, and player interaction. These new requirements, rather than clarifying the existing regulations, appear to repudiate most variants of bingo, slows the play of those that remain, and prevents any meaningful electronic play of pull tabs. For example, without any statutory or case law authority the regulations impose

additional restrictions on pull tabs. Under the proposal, the player terminal may neither accumulate credits nor award cash. A player must, therefore, redeem any pull-tab winnings through a clerk or kiosk, and cannot merely transfer credit between machines. This restriction greatly hinders player flexibility and the use of current cashless technology.

We also object to the redefinition of the statutory term "game of bingo." In enacting IGRA, Congress placed only three requirements on a game of bingo. Notably, the federal courts have continuously held that these three requirements "constitute the sole *legal* requirements for a game to count as class II bingo." The NIGC's current imposition of additional requirements prohibits the growth of class II gaming and micromanages tribal business judgment and regulatory responsibilities. The proposed regulations would eliminate virtually all games that Congress intended to allow as "similar to bingo." The following proposed provisions place arbitrary restrictions on bingo and games similar to bingo and must be deleted:

1) the required use of five by five grid cards (25 spaces) (§546.4(c));

2) games can only use ball draws numbered from 1 through 75 (§546.5(a));

3) elimination of "pre-drawn" balls (if allowed to become law, this would prohibit the electronic play of "Bonanza Bingo," even as a game similar to bingo);

4) mandatory time periods (2 seconds) to play of the bingo game (a requirement wholly unsupportable under current law) (§546.5(i));

5) the requirement for multiple ball releases; the releases may not be instantaneous, and each release must take two seconds (§546.6(c));

6) the elimination of auto-daub and requirement for two seconds of daub time before the next release is permitted (§546.5(i)).

We are also concerned that the regulations fail to resolve the basic problems associated with the NIGC's game classification process and omit a meaningful role for tribal regulators. Under the proposed regulations, independent gaming laboratories, as licensed by the Commission, would certify games as complying with the regulations. Without "grandfathering," few, if any, existing games would comply the proposed regulations, even those already approved by courts or by the NIGC itself. In the interests of fairness, the NIGC should permanently "grandfather" all of the games it has approved as well as the games that the Federal Courts have approved.

Finally, under the proposed rules, only the NIGC Chairman may object to a classification decision. Tribes have no such option, except in defense of an enforcement action. Laboratories must be approved annually, and may lose that approval if the NIGC is dissatisfied with their certification decisions. As the primary regulators of class II gaming, Tribes should be afforded the opportunity to challenge such an opinion on a

government-to-government basis, without having to first subject itself to enforcement action.

In sum, the regulations arbitrarily redefine established regulatory terms and limit what Congress clearly intended to permit. Under IGRA, Congress clearly permits the use of electronic equipment, or "technologic aids," in the play of class II games. Legislative history shows that Congress was alert to the fact that technology would continue to advance, and that class II gaming likewise should be allowed to evolve and grow through technological advancement. As noted in the Senate report: "The Committee intends that tribes be given the opportunity to take advantage of modern methods of conducting class II games and the language regarding technology is designed to provide maximum flexibility."

The NIGC should honor both the spirit and the language of IGRA, the Tribes' hard-fought federal court victories, and the NIGC's own regulatory framework: including, the current 2002 definition regulations. We urge the NIGC to give these comments serious consideration and to refrain from placing unwarranted restrictions on class II gaming.

Sincerely,

James Steele, Jr.
Chairman

cc: Senator Baucus, Senator Burns, Congressman Rehberg